

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MICHELLE J. MULLICAN-RODRIGUEZ**

Claimant

VS.

**INTERSTATE BRANDS CORPORATION**

Respondent

Self-Insured

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Docket No. 1,024,192

**ORDER**

Respondent appeals the May 12, 2008 Award of Administrative Law Judge Robert H. Foerschler (ALJ). Claimant was found to have suffered a 10 percent permanent partial disability on a functional basis to the left upper extremity at the shoulder and a 10 percent to the right knee.

Claimant appeared by her attorney, Thomas Stein of Kansas City, Missouri. Respondent appeared by its attorney, Matthew J. Hempy of Kansas City, Missouri.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on August 5, 2008.

**ISSUES**

Respondent raises the issue of whether claimant provided her employer with timely notice of accident pursuant to K.S.A. 44-520. The ALJ, in the Award, stated as follows:

Some reason, may be not the best, is given for her notice of the claim being delayed past the regular 10 days allotted by our Workers Compensation statutes and is supported by the testimony of Bill Streit *[sic]*, the steward.<sup>1</sup>

As benefits were awarded, the ALJ must have found notice was given, but it is unclear from this language whether the ALJ found notice was not given within 10 days,

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<sup>1</sup> Award of May 12, 2008, at 5.

followed by a finding of just cause or whether the ALJ actually determined that timely notice was given by claimant. The parties, at oral argument to the Board, argued both the notice and just cause issues. Respondent argued that notice was not timely given, and no evidence of just cause existed in this record. Claimant argued that notice was clearly given to claimant's supervisors on several occasions, both by cell phone and in person.

### **FINDINGS OF FACT**

Claimant began working for respondent on March 22, 2005, as a route sales representative. This required claimant drive a delivery truck with snack cakes to various schools in both Kansas and Missouri. Claimant testified that on May 2, 2005, while delivering her products, she fell inside her delivery truck. Whether claimant suffered an accident which arose out of and in the course of her employment is not disputed here. The dispute centers around whether claimant told respondent of the incident in the truck and when that information was provided to respondent.

Claimant alleges that she contacted both Mike Garza, respondent's branch manager and one of claimant's supervisors, and Scott Chilcutt, respondent's division manager, with her cell phone on the day the fall occurred. However, no cell phone records were introduced into evidence. Claimant also alleges that, after returning to respondent's facility, she talked to both Mr. Garza and Mr. Chilcutt about the incident and requested medical treatment for her injuries. Her contacts with Mr. Garza and Mr. Chilcutt were described as numerous. Both Mr. Garza and Mr. Chilcutt deny any such contacts occurred. Claimant was never referred for any medical treatment.

Claimant also testified that she talked to William D. Street, a route sales representative for respondent and a union steward for both claimant's and his Teamsters Local 955, soon after the injury happened. She also testified that she later talked to Mr. Street about the incident numerous times. Mr. Street was not claimant's supervisor.

Claimant had a meeting with Mr. Garza, Mr. Chilcutt and Mr. Street on June 3, 2005. This is the first time respondent acknowledges being told of the alleged May 2, 2005 injury. Claimant had gone to Mr. Street requesting assistance in obtaining medical treatment for her injuries. Mr. Street then accompanied her to the June 3, 2005 meeting with Mr. Chilcutt and Mr. Garza and was successful in obtaining an immediate referral for claimant for medical treatment.

Both Mr. Garza and Mr. Chilcutt deny that claimant contacted them by phone or in any other way about a May 2, 2005 injury before the June 3, 2005 meeting with claimant and Mr. Street.

Mr. Street testified that he was approached by claimant about a work injury with a request that he accompany her to discuss her need for medical treatment with Mr. Chilcutt. This discussion with claimant occurred a few days before the meeting with Mr. Garza. As noted above, claimant was referred for medical treatment shortly after the meeting with Mr. Garza and Mr. Chilcutt. Mr. Street remembered having only one conversation with claimant about her alleged workers compensation injury before the meeting with Mr. Garza and Mr. Chilcutt, and that contact preceded the meeting by only a few days.

### **PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.<sup>2</sup>

K.S.A. 44-520 goes on to say:

The ten-day notice provision provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident . . . .<sup>3</sup>

It is not clear from this record whether the ALJ found that claimant failed to give notice within 10 days as is required by the statute and then determined that there was just cause for claimant's failure to provide notice. If that is the case, then a finding that there was just cause for claimant's failure to provide timely notice has no support in this record. Claimant did not contend and did not prove that there was justification for a delay in notifying respondent of this alleged accident. Her contention has always been that she told both Mr. Garza and Mr. Chilcutt of the injury on many occasions and, at the same time, requested medical treatment. Thus, if the ALJ did determine just cause existed here, that finding is reversed.

If the ALJ found notice was timely given in this matter, that finding must also be reversed. Claimant's allegations of multiple contacts with Mr. Garza, Mr. Chilcutt and even Mr. Street is not supported by the testimony of any of the named gentlemen. Both Mr. Garza and Mr. Chilcutt deny knowledge of claimant's alleged injury until the June 3, 2005 meeting. Even Mr. Street contradicts claimant's allegations of multiple contacts with him before the June 3, 2005 meeting. Plus, his contact with claimant occurred

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<sup>2</sup> K.S.A. 44-520.

<sup>3</sup> K.S.A. 44-520.

only a few days before the June 3, 2005 meeting, not within 10 days of May 2, 2005, as is required by K.S.A. 44-520. The Board finds that claimant did not provide timely notice of an accident occurring on May 2, 2005. Therefore, any award of benefits must be reversed.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be reversed as claimant failed to prove that she provided timely notice of an accident as is required by K.S.A. 44-520.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated May 12, 2008, should be, and is hereby, reversed and any award for compensation in this matter is denied.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Thomas Stein, Attorney for Claimant  
Matthew J. Hempy, Attorney for Respondent  
Robert H. Foerschler, Administrative Law Judge